No. 12,162

In the United States
Circuit Court of Appeals
Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

RAYMOND DOWNUM and
EMMA DOWNUM, husband and wife, *Appellees*.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States
for the District of Idaho
Northern Division

HON. CHASE A. CLARK, Judge

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ARGUMENT

The Appellant herein replies to the brief of the Appellee. In Appellant's brief we presented to the Court arguments and contentions that the lower court committed error in that, generally, the damages were excessive, that the award for future loss of wages were excessive and erroneously arrived at, and that the Court was without authority to amend the Findings of Fact. Now, without going into these arguments again, in the detail they were presented in the original brief, attention should be called to the fact that the Appellee casually dismisses our arguments as being "specious" and "ingenious." These things cannot be dismissed so lightly. They are important and go to the heart of the appeal by Appellant. Counsel for Appellee does discuss the question of the excessiveness of the award and concludes, generally, that "the recovery allowed by the trial court was not excessive, taking into account all factors which appear in this case." Appellant urges upon the Court consideration of the other questions raised in this record.

With respect to using the Annuity Valuation Tables in determining the award for loss of future earnings, it is conceded by all of the authorities that the use of such tables is not a fixed and binding rule upon the Court, but is only a standard or a gauge—some method which the Court can use to approximate a man's earnings over a period of years. Our examination of the authorities in this field of law, lead us to the conclusion that the use of an annuity table in determining

loss of future earnings is increasing, and that courts, generally, are turning to this type of evidence and especially in awarding amounts for loss of future earnings. We do not believe that their use and value to a Court can be so lightly dismissed.

The Appellant is well aware that the Appellee did suffer as a result of this accident, but counsel for the Appellee in arguing in his brief attempts to set forth the degree of disability varying from 60 to 75 per cent. Appellant contends that the degree of disability is fixed by the finding of the Court at 60 per cent, and the same holds true as to the finding of the average annual wage. We think counsel for Appellee confuses the issue by showing that the Appellee made a capital gain of $6,382.19 from the sale of the farm, when discussing the average annual income of the Appellee. What this has to do with Appellee's earning record, we fail to see. It has nothing to do in determining what the Court should award for loss of future earnings. The Court found that the Appellee had an average annual income of $3,000 per year, and this has to be the basis of the award for loss of future earnings. It must be conceded, and all authorities hold to this point, that as the man grows older his earnings will necessarily diminish. In our first brief, we conceded, for the sake of the argument, that the Appellee would earn $3,000 to the date of his death, and gave him the benefit of this constant annual income, which, of course, substantially raises the total of the loss of future earnings.

Counsel, in their brief, fail to answer to our contention that the Court should not have lumped together the award for pain, suffering, and past and future loss of earnings. Again, we state that we do not know whether the amount was awarded for future earnings, or whether this amount was for pain and suffering, or what ratio each bore to the total award.

Appellee places great reliance on the Montana case in which an award of $76,112.00 was sustained. (Fulton v. Chauteau County Farmers' Co., 27 P. (2d) 1025 at 1034) and (McDonald v. Standard Gas Engine Co., 47 P. (2d) 777, 8 Cal. App. (2d) 464.) In connection with these citations, we point out one was a Montana case, and the other a California case. No Idaho cases are cited. Federal Tort Claims Act (28 USCA 931 et seq.) follows the law of the state in which the accident occurs, which is the Idaho law, and governs the measure of damages in this case.

CONCLUSION

In conclusion we urge that this matter be reversed, and we submit that error was committed by the lower court in lumping the award as it did, or in making one finding and award. Further, that the award is excessive under all the facts and the law.

We urge that the lower court be reversed upon the grounds and for the reasons we have heretofore set forth in this record.

Respectfully submitted,

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